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SUPREME COURT, U.S.

No. 06-1595

IN THE

Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Comes the Metropolitan Government of Nashville and Davidson County ("Respondent"), and responds to the Brief of *Amicus Curiae* of the United States of America ("United States"):

STATEMENT OF THE CASE

In an unpublished opinion, the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") affirmed the decision of the United States District Court for the Middle District of Tennessee ("District Court"), holding that Petitioner Vicky Crawford ("Petitioner") had not engaged in protected activity pursuant to Title VII of the Civil Rights Act of 1964, ("Title VII"), by giving a statement during an internal sexual harassment investigation initiated by her employer. (Petition for Writ of Certiorari ["Pet."] at 3a-10a). Specifically, the Sixth Circuit held that Petitioner's conduct was not covered by Title VII's anti-retaliation provision, Section 704(a), 42 U.S.C. § 2000e-3(a)("Section 704(a)").

Petitioner has requested that this Court review this decision, and the United States has filed an *Amicus Curiae* brief in support of Petitioner's request. For the reasons set forth herein, Respondent submits that the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE ISSUES RAISED IN THIS CASE HAVE BEEN DECIDED CONSISTENTLY BY ALL CIRCUIT COURTS ADDRESSING THEM.

This Court has unequivocally stated that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Moreover, this Court has identified the primary example of such a compelling situation: "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." Sup. Ct. R. 10(a). Here, it is undisputed that there is no circuit split.

The United States repeatedly admits that there is "no square conflict" among the circuits "on either the opposition or participation clause issue" decided in Respondent's favor by the Sixth Circuit.[1] (Brief for the United States as *Amicus Curiae* ["*Amicus* Br."] at 15). The United States also undermines Petitioner's reliance on a litany of cases because those decisions did not focus on the issues decided by the Sixth Circuit and therefore cannot be deemed to create a circuit split. (*Amicus* Br.

1. Despite this admission, the United States asserts earlier in its brief that "[n]o appellate decision" has limited the phrase 'investigation'" under Title VII to EEOC investigations. (*Amicus* Br. at 11). This statement is inaccurate and is contradicted by established law as well as the United States' own statement on pages 17-18 of its brief that "the Sixth Circuit's view is in line with the decisions of other circuits" that have found that Title VII's participation clause is triggered only after the filing of an EEOC charge. (*Amicus* Br. at 17-18) (citations omitted).

at 16-17). Finally, the United States concedes that the circuits agree that "the participation clause requires the filing of an EEOC charge. . . ." (*Amicus* Br. at 17-18). Because all of the circuits addressing the issues raised in this case have reached the same conclusion as did the Sixth Circuit here, there is no compelling reason for this Court to grant certiorari.

Despite its recurring statements establishing that no circuit split exists, the United States asserts nonetheless that the Sixth Circuit's decision is an "outlier" when compared to other circuits. (*Amicus* Br. at 15). However, the only case cited by the United States other than those that the United States points out were cited by Petitioner but are not actually in conflict with well-settled precedent, is *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000). *Total Systems* does not support the United States' "circuit split" argument, however.[2] Instead, the Eleventh Circuit simply stated that even if the plaintiff's statements "might otherwise have constituted protected expression under the opposition clause," the district court correctly granted summary judgment to the defendant employer because the employer has shown a legitimate reason for terminating the plaintiff. *Id.* at 1175. This single sentence certainly does not indicate that the Eleventh Circuit has adopted the position that statements made by an employee during an internal investigation of a co-worker's sexual harassment claim, even if those statements corroborate the complainant's account of events, are protected activity under Section 704(a).

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2. In fact, *Total Systems* was one of several cases cited by the Sixth Circuit in support of its decision to affirm the District Court's grant of summary judgment. (Pet. at 8a).

The holding of the *Total Systems* court was that, contrary to the EEOC's position, Title VII did not provide protection for all statements made during an employer's internal investigation. An employee whom the employer believed had lied during the investigation could not invoke the protection of Section 704(a).[3] *Id.* at 1176. The *Total Systems* decision is consistent with Respondent's position and the holding of the Sixth Circuit here: giving statements during an employer's internal investigation, in and of itself, does not afford employees blanket protection under Section 704(a). Thus, the United States' cannot rely on *Total Systems* to create a fictional "circuit split."

II. NO IMPORTANT QUESTIONS OF FEDERAL LAW WILL BE RESOLVED BY GRANTING CERTIORARI.

Another factor to be considered in determining whether to grant a petition for writ of certiorari is whether a court of appeals decision has addressed, "an important question of federal law that has not been, but should be settled by this Court . . ." Sup. Ct. R. 10(c). The present case involves no such "important question

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3. In the present case, Respondent's legitimate reasons for terminating Petitioner were never fully explored by the lower courts. The District Court determined that Petitioner had not engaged in protected activity under Title VII; thus, it declined to address the other grounds raised by Respondent in its motion for summary judgment, including that (1) Petitioner could not show that the decision-makers regarding her termination were aware of the statements that she made during the internal investigation; and (2) Respondent had a non-discriminatory, non-pretextual reason for terminating Petitioner. (Pet. at 13a-14a, 17a).

of federal law." Instead, the United Stated requests that this Court review an unpublished opinion of limited precedential value and re-write provisions of Title VII to serve the interests of an individual who was discharged for gross neglect of her job duties.[4]

A. *An unpublished, non-binding court of appeals decision does not merit examination by this Court.*

The United States' position that this is a case of great importance is undermined by the fact that the Sixth Circuit's opinion is unpublished, which the United States concedes "would normally counsel *heavily* against plenary review." (*Amicus* Br. at 22 [emphasis added]). Sixth Circuit Rule 206(a) provides, in pertinent part, that a panel should consider the following criteria in determining whether a decision should be published:

> (1) whether it establishes a new rule of law, or alters or modifies an exiting rule of law, or applies an established rule to a novel fact situation;
>
> (2) whether it creates or resolves a conflict or authority either within the circuit or between this circuit and another;

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4. Most significantly, Petitioner failed to (1) deposit employee pension contributions; (2) properly remit employee annuity contributions; and (3) timely file federal tax returns, which resulted in significant penalties to Respondent. (Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari ["Resp't's Br."] at App. 20-23, 31-34).

> (3) whether it discusses a legal or factual issue of continuing public interest; . . .

6th Cir. R. 206(a). Not one member of the panel that affirmed the District Court's grant of summary judgment here concluded that its opinion met these criteria. *See* 6th Cir. R. 206(b) ("An opinion or order shall be designated for publication upon the request of any member of the panel").

Additionally, an unpublished opinion does not constitute binding precedent. *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007); *United States v. Ennenga*, 263 F.3d 499, 504 (6th Cir. 2001). It defies logic that an unpublished opinion, given its limited precedential value, represents a monumental decision in the landscape of Title VII litigation.

B. *This Court's review of the facts surrounding Petitioner's justified termination is not needed to answer important questions of federal law.*

Further, the circumstances of Petitioner's termination make this an unsuitable case from which to shape retaliatory discharge law. Contrary to the United States' position,[5] there are no important questions of

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5. In its brief, the United States adopted the "facts" as set forth by the Sixth Circuit, which took the facts in the light most favorable to Petitioner. (Pet. at App. 4a-6a). However, this Court recently noted in *Scott v. Harris* that, when a party's version of the facts is blatantly contradicted by the record, courts instead should view the facts in the light depicted by the record *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007). The record here establishes that Petitioner was terminated for blatant failure to do her job. (Cont'd)

federal law at the heart of this case. The internal investigation here was initiated proactively by Respondent's Department of Law. As part of this investigation, on July 22, 2002, Veronica Frazier ("Ms. Frazier"), Respondent's Assistant Director of Human Resources, requested an interview with Petitioner regarding alleged inappropriate behavior by Petitioner's co-worker, Dr. Gene Hughes ("Dr. Hughes").[6] Petitioner had no idea why Ms. Frazier had requested to speak to her prior to their discussion. (Resp't's Br. at App. 4-6). Petitioner never lodged a complaint about the alleged harasser and took no action to initiate the investigation in question.[7] *Id.*

In January 2003, months after being interviewed by Ms. Frazier, Petitioner was terminated for reasons wholly unrelated to the statements she made during the internal investigation. (Resp't's Br. at App. 29-41). Petitioner was the payroll coordinator for Respondent's public schools. Independent auditors raised concerns

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(Cont'd)

(Resp't's Br. at App. 20-41). The United States chooses to ignore that portion of the record, which also establishes Petitioner's failure to offer evidence refuting the charges leading to her termination, and instead offers only that, "according to [P]etitioner," the accusations made against her "were unfounded." (*Amicus* Br. at 2).

6. Dr. Hughes was not Petitioner's supervisor. (Resp't's Br. at 10, n.4).

7. Furthermore, Petitioner did not even file a charge with the EEOC until June 24, 2003, more than five months after her termination. (Resp't's Br. at App. 42-43).

regarding "operational irregularities" in the payroll department during the annual audit performed in the fall of 2002. A forensic accountant subsequently was engaged to commence a more extensive audit of that department. (Resp't's Br. at App. 30). After a detailed investigation, Petitioner ultimately was terminated due to her well-documented failure to perform her job duties. (Resp't's Br. at App. 25-27). Petitioner was given ample opportunity, at two administrative hearings, to rebut the evidence against her; however, she offered little defense. Additionally, numerous witnesses offered testimony against her during the administrative appeal process. (Resp't's Br. at App. 25-41).

Moreover, the individual who made the decision to terminate Petitioner, Respondent's Superintendent of Business and Facility Services, Chris Henson, was not involved in the internal investigation of Dr. Hughes. (Resp't's Br. at App. 8-17). This discredits Petitioner's contention that she was terminated because of statements made during the internal investigation, especially since investigators were careful in their final investigative report not to attribute specific statements regarding Dr. Hughes' conduct to specific employees. (Resp't's Br. at App. 9).

Simply put, this is not a case involving significant issues of federal law or facts that this Court is likely to encounter again in the future.[8] Petitioner was fired for

8. The United States' position that this a matter of great importance is further undermined by the fact that the EEOC declined to file suit in this case, despite its right to do so. In fact, the EEOC determined that it could not conclude that Petitioner's Title VII rights had been violated at all. (Resp't's Br. at App. 45).

failure to perform her job duties months after having given a statement that corroborated accounts of a co-worker's inappropriate behavior during an internal investigation of such behavior. Petitioner's insistence that other employees who gave statements during the investigation were also terminated in retaliation for their statements is unfounded.[9] Because this case is not one that could adequately shape retaliatory discharge law, given the lack of any retaliation against Petitioner, this Court should decline to grant certiorari.

III. THIS CASE DOES NOT PRESENT SIGNIFICANT PUBLIC POLICY CONCERNS IN NEED OF RESOLUTION BY THIS COURT

A. *If Title VII's language is to be broadened to protect any employee who gives a statement during an internal investigation from ever being terminated, it is Congress' place to do so.*

Legislating public policy comes within the purview of Congress. U.S. CONST art. I, § 8, cl. 18. Here, both Petitioner and the United States appear dissatisfied that Congress did not provide a list enumerating the activities that rise to the level of "opposition" or "participation"

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9. As Respondent has previously noted to the Court, the other two employees whom Petitioner alleges were terminated as a result of the statements that they made during the internal investigation at issue were not victims of retaliatory discharge. (Response to Brief of *Amici Curiae* of the Tennessee Education Association and The Metropolitan Nashville Education Association at 6-7).

for purposes of invoking Section 704(a) protections.[10] However, such dissatisfaction should be voiced to Congress. In drafting Title VII, Congress purposely allowed employers to retain discretion in dealing with their employees in order to balance the interests of employers and employees. *See Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998) (citations omitted). If this autonomy and balance is to be abrogated by significantly broadening the scope of Section 704(a), it is Congress' place to amend Section 704(a) to achieve that purpose. *See, e.g., Ledbetter v. Goodyear Tire and Rubber, Co., Inc.*, 127 S. Ct. 2162, 2177 (2007)("it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees.... We apply the statute as written . . .") (citation omitted).

B. *Adopting the interpretation of Section 704(a) advocated by the United States would deter employers from conducting the internal investigations encouraged by this Court.*

In support of its assertion that Petitioner's case should be reviewed because not providing Title VII protections to all employees giving statements during

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10. The circuit courts agree that the participation clause requires the filing of an EEOC charge before Section 704(a)'s protections will apply. Congress drafted Section 704(a) to refer to two separate forms of "protected activity: "opposition" and "participation." The United States' position that no affirmative action is necessary to invoke protection under the opposition clause, although it is required under the participation clause, renders the participation clause devoid of meaning. Under the United States' interpretation of the statute, the opposition clause would entirely supplant the participation clause.

an internal harassment investigation would have a chilling effect on employees' willingness to participate in such investigations, the United States attempts to rely on this Court's precedent. (*Amicus* Br. at 5, 11-14). However, the United States' reliance on the *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) decisions is misplaced. These cases do not, as the United States suggests, impose an "affirmative duty" upon employers to conduct internal harassment investigations, but instead give employers an affirmative defense to liability or damages under certain circumstance when the employer exercises reasonable care to prevent and correct sexual harassment in the workplace. *Farragher*, 524 U.S. at 777-778.

As stated in *Ellerth*, "[l]imiting employer liability is . . . consistent with Title VII's purpose to . . . encourage the creation and use of antiharassment policies and grievance procedures." *Ellerth*, 524 U.S. at 745. Still, if the employer proceeds unreasonably or in bad faith, the employer loses this protection. *Kolstad*, 527 U.S. at 545-546. The Sixth Circuit astutely noted, in response to the assertion that employees would be unwilling to give statements during internal investigations if they were not given blanket protection under Section 704(a), that "[c]ertainly, a policy or practice of firing a person who testified negatively during an investigation into complaints of sexual harassment would not be 'reasonable'" and "would certainly constitute bad faith." (Pet. at 9a). In that situation, the protections afforded by the affirmative defense to liability available to an employer under *Farragher*, *Ellerth*, and *Kolstad* would

disappear. Thus, this Court's well-established precedent defeats Petitioner's contention that an employer can hide behind a vicarious liability shield while simultaneously wielding a retaliation termination sword against witness employees unless the scope of Section 704(a) is broadened.

The reality is that adopting the United States' position here would have a chilling effect not upon employees' willingness to participate in internal investigations, but upon employers' willingness to conduct them. If "protected activity" under Title VII is broadened to include an employee's giving of a statement, upon request, to an employer who has initiated an internal investigation of a harassment complaint, employers would lose the incentive created by *Farragher*, *Ellerth*, and *Kolstad* to conduct such investigations. Under the United States' proposed interpretation of Section 704(a), employers would be unable to terminate an employee who gave a statement during an internal investigation, no matter when or for what reason that termination occurred, without fear of a retaliation lawsuit. Such a result would discourage the very type of investigations that this Court promoted through its earlier decisions and would undermine the purposes of Title VII. *See Kolstad*, 527 U.S. at 545 ("[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII."). Accordingly, there is no compelling reason for this Court to review the Sixth Circuit's decision here, which gives effect to the language of Section 704(a) and is consistent with the policies underlying Title VII.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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